

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1212

To be argued by
JOSEPH L. BELVEDERE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75 CR 772

HECTOR CHRISTIAN,

Appellant,

v.

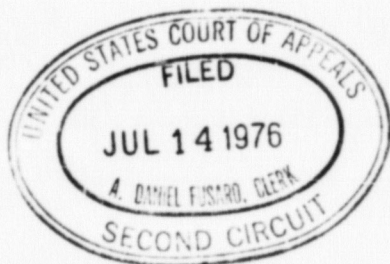
UNITED STATES OF AMERICA,

Appellee,

On Appeal From the United States District Court
For the Eastern District of New York

BRIEF FOR APPELLANT HECTOR CHRISTIAN

JOSEPH L. BELVEDERE
Attorney for Appellant
Hector Christian
4518 - 11th Avenue
Brooklyn, New York 11219
(212) 435-8087



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75 CR 772

HECTOR CHRISTIAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee,

On Appeal From the United States District Court
For the Eastern District of New York

BRIEF FOR APPELLANT HECTOR CHRISTIAN

TABLE OF CONTENTS

	Page
Preliminary Statement	2
The Evidence	3
Point I	11
Point II	13
Point III	15
Conclusion	16

TABLE OF AUTHORITIES

United States v. Cirillo 468 F 2d 1233	12
United States v. Tramunti 513 F 2d 1087	13
United States v. McGuire 249 F Sup 43, aff 38 F 2d 306	14
United States v. Terrell 474 F 2d 872	14
United States v. Euphemia 261 F 2d 411	15

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered against the defendant, HECTOR CHRISTIAN, after a trial by jury in United States District Court for the Eastern District of New York. (Mishler, C.J.)

The Indictment, 75 CR 772-3 was filed on October 21, 1975, and charged appellant, HECTOR CHRISTIAN, and two other defendants, ARMANDO ESPARZA and DELPHIN GONZALEZ, a/k/a "LEO GONZALEZ", with one count of conspiracy commencing on or about May 16, 1975, and ending on or about May 31, 1975, to violate Section 841 (a) (1) of Title 21, U.S.C.

Appellant was, on May 7, 1976, sentenced to serve two (2) years in the Federal Penitentiary and, additionally, was sentenced to a special parole term of three (3) years.

Appellant filed his notice of appeal on the day of sentence.

EVIDENCE

The case against the appellant rests almost totally on the testimony of Louis Rodriguez, an admitted co-conspirator who, after being arrested, became a government witness and upon the testimony of Nicholas Alleva, A Special Agent for the United States Department of Justice Drug Enforcement Administration. The testimony given by Rodriguez was for the most part corroborated by that of Alleva.

Rodriguez testified that prior to the sale of cocaine, which was consummated on May 29, 1975, and which became the basis of this indictment, he had arranged two prior sales of cocaine to Agent Alleva; the first sale took place on March 24, 1975, for one-eighth of a kilo and the second sale took place on April 1, 1975, for a pound, and in which sales none of the defendants named in this present indictment had any part.

Agent Alleva arrested Rodriguez on May 22, 1975, for his participation in the prior sales of cocaine which took place on March 24, 1975, and April 1, 1975.

Subsequently, in an effort to extricate himself, Rodriguez offered to be a government witness and to cooperate in the arrest and trial of the appellant and his co-defendants.

As a reward for his services, Rodriguez was allowed to plead guilty to a violation of Section 843, Title 21, of the Drug Abuse and Control Act and his sentence was deferred until after the trial of the appellant herein.

At the trial of the appellant, Rodriguez testified that he met Christian for the first time in Tinita's Bar at 46th Street and 5th Avenue in Brooklyn, New York, during the middle of March, 1975. At the time that he met Christian, Rodriguez testified that he already was acquainted with Agent Alleva and was under the impression that Alleva was a big-time dealer in drugs.

Rodriguez introduced Christian to Alleva on April 21, 1975, at the Roaring 20's Bar, 32d Street and 4th Avenue, Brooklyn, New York, at which time a conversation ensued between Christian and Alleva and in the presence of Rodriguez. The conversation was a discussion concerning the sale and purchase of a quantity of cocaine.

Between April 21, 1975, and May 15, 1975, there was no contact between Rodriguez and Christian. Rodriguez testified that Christian called him at his place of business on May 15, 1975, to offer some good merchandise which was available immediately. (Page 39, Lines 3-8) It was arranged that

Christian would meet Rodriguez at Tinita's Bar that night. A meeting was had at Tinita's Bar between Christian and Rodriguez at approximately 9:30 P.M. and Christian stated, "The stuff is available for tomorrow if they want it." (Page 39, Lines 24-25)

On May 16, 1975, Rodriguez testified that he had a conversation with Alleva and was instructed by Alleva to make the arrangements for the purchase which was to take place at the Toll Gate bar between 8:30 and 9 o'clock that evening.

Rodriguez further testified that on the evening of May 15, 1975, he left his job and went to Tinita's Bar where he met Christian who assured him that everything was all right and that they would meet at the Toll Gate Bar that night. Rodriguez then went to the Toll Gate Bar at 8th Avenue and 39th Street in Brooklyn, New York, where he met with Alleva and Agent Cavuto who was masquerading as Alleva's nephew and helper in the drug business. Christian never appeared at the Toll Gate Bar and after some conversation between Alleva and Rodriguez, Rodriguez telephoned Christian as Tinita's Bar. Subsequently, Rodrigues, Alleva and Cavuto left the Toll Gate Bar and went to Tinita's Bar where they met Christian. There was a conversation and Christian assured them that the stuff

would be there but that there had been a little delay.

(Page 44) Gonzalez then came to the bar and was introduced by Christian to Rodriguez and Alleva as being one of the fellows supposed to deliver the merchandise. (Page 44, Lines 22-44)

Gonzalez explained the delay in delivery by stating, "The other fellow should be right behind. I was driving a little fast and the other fellow behind me got the merchandise, so he should be here any minute." (Page 45, Lines 4-8)

Rodriguez testified that after this conversation, "We just stood there and waited another half hour so and nothing happened. Then I decided to call the whole thing off and so the agent and Mr. Christian got mad and stepped away from the bunch and all of a sudden we found ourselves outside on the sidewalk, the agents, myself and Leo talking and that is when Leo did most of the talking with the agent. I did a little bit of translating because of his English and he gave the agent a telephone number and I gave Leo my business card from the place I was working because we wanted to see if we could deal with him instead of Christian, leave him out of the picture" (Page 45, Lines 14-25) (Underlining supplied)

On his direct testimony concerning the above-mentioned meeting, Agent Alleva testified:

"Gonzalez and I walked across. He made a phone call, hung up and said that he still couldn't get in touch with his man, came back and I told him if he wanted to do business, I would give him one more chance, but that I would need a phone number where I could reach him and he told me that he would give me a phone number, and at the time I didn't have a pen and paper, and Rodriguez gave me a pencil and paper.

"I wrote down the phone number that Gonzalez had given me and he told me to call him at 7:00 o'clock the following day, which would be Saturday, the 17th, 7:00 P.M.

"At the same time, Rodriguez handed one of his cards to Gonzalez. I told Gonzalez that I would call him the following day and I said to him, 'How did you get here without your man? You have a car.'

"And he pointed out a red Pontiac which was parked right on the same corner but the adjacent street. He pointed out a red 1968 Pontiac, I believe the plate is 908YNW, and he said that was his car." (Page 222, Lines 4-23)

"And at this point Christian had walked away just prior to this conversation and at this point we just said, 'Okay, we'll leave it for tomorrow,' and Special Agent Cavuto, Gonzalez, Rodrigues and I went across the street and had something to eat." (Page 222, Line 24 to Page 223, Line 4)

Agent Cavuto's direct testimony concerning the meeting was:

"We waited. We were waiting at the Bar and about -- after about 15 or 20 minutes, Christian and Gonzalez left the bar.

"Q. Did there come a time that they returned to the bar?

"A. Yes.

"Q. Do you recall how much later this was?

"A. I would say it was about 20, 25 minutes after they left.

"Q. Will you tell the jury what occurred when they returned to the bar?

"A. They came in together and they approached where Agent Alleva and Rodriguez and myself were standing. And there came a time when Agent Alleva approached them and

asked what happened. And Gonzalez answered, and said that he didn't know what happened, that they had left Manhattan together. (Page 379, Line 18)

"Q. What occurred after this?

"A. We still waited. We were waiting at the bar. And we waited about another 10, 15 minutes and then we all went outside.

"Q. What did you do? When you say 'we all,' whom are you referring to?

"A. Myself, Agent Alleva, Rodriguez, Gonzalez and Christian.

"Q. What occurred when you -- when you exited the bar? Tell us the circumstances, who was standing where and who was doing what, as you recall?

"A. After we got out, Christian left. And I was standing off to the side with Rodriguez and Agent Alleva was conversing with Gonzalez. (Page 379, Line 2 to Page 380, Line 9)

On May 17, 1975, Gonzalez contacted Rodriguez directly by telephone and arranged to meet Rodriguez at his place of business, Nemet Ford, at 153rd Street and Hillside Avenue, Jamaica, New York, at which time Gonzalez introduced Esparza to Rodriguez.

"At evening, Rodriguez stopped by Tinita's Bar and spoke with Christian. "He said to me when I approached him, 'I know you are going to deal directly with the source and I feel that I have been left out.'" (Page 49, Lines 11-13)

Subsequent to this meeting between Christian and Rodriguez at Tinita's Bar on May 17, 1975, which Rodriguez initiated, Christian disappears from the scene and there is no testimony of any witness connecting Christian with any of the subsequent events or with the eventual sale of cocaine which took place on May 29, 1975, at the Toll Gate Bar.

POINT I

THE INDICTMENT CHARGES ONLY A SINGLE ON-GOING CONSPIRACY BUT THE PROOF AT TRIAL ACTUALLY SHOWED TWO INDEPENDENT CONSPIRACIES.

The government's proof relied principally on the testimony of Rodriguez buttressed by the testimony of Alleva. Rodriguez's testimony in effect embraced two separate transactions. The evidence did show two conspiracies engaged in by two separate groups. Both conspiracies began on separate dates and both conspiracies involved a different group of defendants. The first conspiracy terminated before the second conspiracy began.

The first conspiracy involved Rodriguez, Gonzalez and Christian and had its origin in late April, was finalized on May 15, 1975, by Rodriguez and Christian, and aborted on May 16, 1975, with neither a delivery or sale of cocaine. Because the cocaine was not delivered as planned, "he (Gonzalez) gave the agent a telephone number and I gave Leo my business card from the place I was working because we wanted to see if we could deal with him instead of Christian, leave him out of

the picture." (Supra Page 45, Lines 14-25)

Christian also understood that he was no longer considered by the others as part of the group and that he had no share or part in the future dealings of the group. "I (Christian) know you are going to deal directly with the source and I feel that I have been left out." (Page 49, Lines 11-13)

Gonzalez and Esparza accepted the decision made by Rodriguez to ease Christian out of the conspiracy and the visit paid by Gonzalez and Esparza to Rodriguez at Nemet Ford signified their assent.

Henceforth, the conspiracy was to involve Rodriguez, Gonzalez and Esparza who would in turn deal, without the knowledge or assistance or assent or involvement of Christian, directly with Alleva.

The critical inquiry in any conspiracy case involves a determination of the kind of agreement or understanding that existed as to each defendant as he understood it. (United States v. Cirillo, 468 F.2d 1233 (2 Cir.))

The government failed to show that the two separate transactions - the two separate spheres of operations - in

the narcotics conspiracy had that degree of mutual dependence and assistance to warrant the treatment of the two spheres as one general business venture involving Christian along with Rodriguez and Gonzalez and thus support Christian's conviction on the one count of conspiracy.

Although the two spheres were linked by a single sale to a common distributor, there were not those links of mutual cooperation and mutual trust. (U.S. v. Tramunti 513 F.2d 1087 (1975))

POINT II

CHRISTIAN ABANDONED THE
CONSPIRACY ON MAY 16, 1975.

Each defendant's participation in a conspiracy must be shown solely by his own acts and deeds and those acts and deeds must show a connection to the conspiracy with which he is charged. There is no evidence of any activity or participation on the part of Christian, either solely or in concert with any of the co-conspirators, after the aborted sale scheduled for May 16, 1975.

Alleva, by his actions in dealing directly with Gonzalez had pushed Christian out of the group on May 16, 1975, and Rodriguez and Gonzalez delivered the final blow to Christian's participation on May 17, 1975.

The last contact Christian had with any of the co-conspirators was the final conversation between Rodriguez and Christian which ended with Christian's final words, "I know you are going to deal directly with the source and I feel that I have been left out." (Page 49, Lines 11-13)

Christian knew, as did Rodriguez, that he was no longer a part of the group. The knowledge might have been accepted reluctantly by Christian, but accepted it was and he communicated that to Rodriguez in their final encounter. Christian was out. He knew it and he said so to Rodriguez. (U.S. v. McGuire 249 F Sup. 43, Aff. 38 F. 2d 306)

The mere suspicion and nothing more on the part of Christian that the other parties were dealing without him is insufficient to inculcate Christian in the second sphere of activity. (Dennis v. U.S. 302 F. 2d 5) Even mere association coupled with knowledge, nothing more, is not sufficient to implicate Christian. (U.S. v. Terrell 474 F. 2d 872 (2

Cir. 1973)) To be implicated, Christian had to make an affirmative attempt to further the success of the second sphere of activity. (U.S. v. Euphemia 261 F.2d 411 (2 Cir. 1958))

There was no evidence from any source which linked Christian to the second sphere of activity. Nor is there any evidence to even remotely suggest that Christian knew of any further activity on the part of Rodriguez, Gonzalez and Esparza.

After the conversation had between Christian and Rodriguez on May 16, 1975, Christian totally disappeared from the scene.

POINT III

THE DEFENDANT, HECTOR CHRISTIAN
ADOPTS ALL POINTS AND ARGUMENTS
RAISED BY CO-APPELLANTS WHICH
WOULD BE APPLICABLE TO HIM.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed, or, in the alternative, a new trial should be granted.

Respectfully submitted,

JOSEPH L. BELVEDERE
Attorney for Appellant
Hector Christian
4518 - 11th Avenue
Brooklyn, New York 11219
(212) 435-8087

PROOF OF SERVICE

JOSEPH L. BELVEDERE, being duly sworn, deposes and says that he is the attorney for HECTOR CHRISTIAN, the defendant-appellant herein. That on the 13th day of July, 1976, he served the within Appellant's Brief on: *Appellant's Brief*

The Honorable David G. Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

William J. Gallagher, Esq.
The Legal Aid Society
Attorney for Delfin "Leo" Gonzalez
Federal Defender Services Unit
509 United States Court House
Foley Square, New York, New York. 10007

Stephen R. Laifer, Esq.
Attorney for Appellant Esparza
16 Court Street
Brooklyn, New York. 11241

which addresses are the addresses designated by the said attorneys for that purpose, by depositing the same enclosed in a postpaid wrapper, properly addressed in a post office under the exclusive care and custody of the United States Post Office Department within the City of New York.

Sworn to before me this
13th day of July, 1976.

Richard A. Ciccone

Joseph L. Belvedere
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-067583
Qualified in Kings County
Commission Expires March 20, 1977